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SUPREME COURT U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 58

WILLIAM LUDWIG ULLMANN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER

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Opinions Below

The opinions of the Court of Appeals (R. 54-60) are reported at 221 F. 2d 760. The opinion of District Judge Weinfeld (R. 28) on the government's application for an order compelling the witness to testify is reported at 128 F. Supp. 617. There was no opinion rendered by District Judge Murphy who adjudicated petitioner guilty of contempt for failing to comply with Judge Weinfeld's order (R. 53).

Jurisdiction

The judgment of the Court of Appeals was entered on April 4, 1955 (R. 60). The petition for a writ of certiorari was granted on June 6, 1955 (R. 61). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Statute Involved

This case involves the Immunity Act of 1954, Public Law 600, 83rd Congress, 68 Stat. 745, 18 U. S. C., Section 3486. The text of the statute is set forth in the appendix.

Questions Presented

1. Whether the constitutional privilege of the Fifth Amendment must not be read literally in this case to prohibit any compulsion to testify notwithstanding any promises of immunity.

2. Whether the statutory grant of immunity is not illusory since the witness, by testifying, will subject himself to prosecution, penalties and forfeitures arising from the federal, state, institutional and group sanctions today imposed upon political dissenters.

3. Whether the constitutional privilege guarantees petitioner protection against state criminal prosecution and, if so, whether Congress intended to and could constitutionally effectuate this guarantee by delegating the immunity power to federal officials.

4. Whether under the statute immunity is granted by the Attorney General alone or by the court upon the application of the United States Attorney.

5. Whether the grant of immunity by the court is a constitutional exercise of a judicial function, and, if so, whether the court may issue such order without a record to support that action.

6. Whether petitioner was properly directed to testify where the government's purpose was to compel testimony for which he might be indicted for perjury.

7. Whether in an espionage investigation questions as to political affiliations were not improper and violative of the First Amendment.

8. Whether the order below complied with the due process clause of the Fifth Amendment and with the statute where the order contained no express grant of immunity, and the District Court refused to define the scope of the immunity grant.

Statement of the Case

On August 20, 1954 Congress enacted Public Law 600, 83rd Cong.; 68 Stat. 745, amending 18 U. S. C. 3486. It established a procedure to compel witnesses before congressional committees, grand juries and courts to testify, notwithstanding their proper assertion of the constitutional privilege under the Fifth Amendment, by an order of the United States District Court. The witness would thereby be granted immunity from prosecution, penalties and forfeitures whose precise scope, as we shall see, is uncertain. This is the first statute granting such power to the federal courts in the history of this country.

On November 4, 1954, the United States Attorney for the Southern District of New York made a written application to the District Court, Weinfeld, J., upon notice to petitioner, for an order under the statute directing him to testify before a federal grand jury (R. 1). The applica-

tion merely stated that the grand jury was investigating the commission of wartime espionage and that petitioner had declined to answer certain specified questions, relying on his privilege under the Fifth Amendment. The application recited the "judgment" of the United States Attorney that immunity be granted and the "approval" of the Attorney General. It was accompanied by the latter's letter of approval (R. 5).

Petitioner filed an affidavit in opposition to the application (R. 7-22). Respondent filed answering affidavits and, upon the request of the District Court, an affidavit of good faith (R. 6-25).

Petitioner's affidavit, which was not substantially disputed with respect to the material allegations, set forth the following: Petitioner and other former officials of the United States Treasury Department were accused of espionage by one Elizabeth Bentley in 1945 and thereafter. Since 1947 petitioner has been interrogated on this subject once by the Federal Bureau of Investigation, four times by congressional committees and three times by federal grand juries (R. 9-10). Despite petitioner's repeated denials of espionage, the Attorney General of the United States publicly accused him of espionage (R. 16-17) (Hearings before Subcommittee to Investigate the Administration of the Internal Security Acts and other Internal Security Laws, Committee on the Judiciary, United States Senate, 83rd Congress, 1st Sess., on Interlocking Subversion in Government Departments, Part 16, pp. 1110-1141 (1953)). Petitioner's affidavit shows that the Attorney General has made a major political issue of this espionage charge and that petitioner's sworn denial today of the accusation might well lead to his unfounded indictment for perjury (R. 8, 18, 22).

The government introduced no evidence in denial of petitioner's charges or otherwise in support of the application (see R. 6-28). The District Court denied petitioner's ap-

quest that it examine the grand jury minutes to determine whether the grand jury had any evidence of espionage whatsoever or was otherwise making a bona fide investigation into crime (S. M. 76).*

Instead, on February 1, 1955, District Judge Weinfeld rendered a decision sustaining the constitutionality of the statute, holding that the court played no part in the grant of immunity and that the government was under no duty to produce evidence in support of its application (R. 28). He also overruled the additional constitutional and other objections made by petitioner to certain of the questions.

The District Court order, entered on February 8, 1955, made no findings of fact with respect to the necessity or propriety of the testimony (R. 44). It directed petitioner to appear and to answer pursuant to the statute, not only the questions set forth in the application, but all other questions on the same subject. The court did not make an explicit grant of immunity in its order nor did it indicate even in the most general terms the scope of the immunity which the witness, thus compelled to testify, was to receive.

On March 8, 1955, petitioner again declined on the ground of his constitutional privilege to answer the questions put to him by the grand jury. He was thereupon convicted of contempt by District Judge Murphy. The court entered judgment sentencing him to six months' imprisonment with the right to purge (R. 53).

The Court of Appeals affirmed the conviction, each judge writing a separate opinion (R. 55-60). These opinions indicated that the court felt itself bound by this Court's decision in *Brown v. Walker*, 161 U. S. 591, although as an original proposition it would have decided the matter in favor of petitioner, especially in view of the factual situation herein presented.

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* S. M. refers to the stenographic record of the hearing before Judge Weinfeld which by agreement of counsel was before the Court of Appeals. It will be filed with this Court.

Summary of Argument

This statute, as Chief Judge Clark said below, "undermines and so far forth nullifies one of the basic differences between our justice and that of the systems we condemn, namely, the principle that the individual shall not be forced to condemn himself" (R. 59). It represents a "precipitate" stage of the erosion to which the Fifth Amendment has been subject in recent years (*id.*).

The constitutional privilege arose in the 17th Century in the attempt to protect religious and political dissent. The comparable intolerance and repression of this past decade requires the fullest application of the privilege.

This Court has upheld laws purporting to exchange immunity for the constitutional privilege. However, those cases involved the regulation of business rather than political or religious opinions and beliefs, the original occasion for the privilege. Now that this problem has reappeared, the Constitution should be read literally, and construed liberally to meet it.

1. It may reasonably be argued that the Constitution must be literally construed and that no person may be required to give evidence against himself regardless of the considerations and protections offered. This view has the practical merit of giving complete protection to the witness and of not making his safety depend upon his future ability to prove the receipt, scope and application of the immunity grant. It is particularly appropriate where First Amendment rights, which the privilege was intended to protect, are affected.

2. In any event the immunity offered by the Immunity Act of 1954 involved is fictitious because it is not coextensive with the privilege, the irreducible condition of validity. The statute disregards and fails to give protection against the

numerous criminal, civil and economic sanctions imposed upon the dissenter.

The statute exposes the witness to public infamy and the sanctions resulting therefrom. This is a far cry from the hypothetical disgrace of the auditor in *Brown* v. *Walker*. The present victim is a political dissenter whose home, job, insurance, trade-union membership, and community status may be lost by his revelations.

3. The statute subjects the witness to the hazards of a perjury prosecution based upon his compelled testimony. In the last decade perjury prosecutions have become a standard method of punishing political dissenters not susceptible of prosecution under substantive laws. The widespread use of political informers of recognized unreliability and the lack of preciseness in the subjects of interrogation create a very real danger for the witness.

4. The very act of association against which this statute is directed is a continuing one. The compelled testimony will facilitate criminal prosecutions for conduct subsequent to the testimony.

5. The Immunity Law subjects the witness to state criminal prosecution. Even if Congress had intended to give complete immunity against state prosecution, this intention could not be carried out since the federal investigatory power cannot nullify substantive state legislation. The cooperation between state and federal governments in the field of "subversive activities" and the increasing state and local regulation of this subject make the danger from the states a very real one for the federal witness.

6. The statute was misread by the courts below when they agreed that the Attorney General rather than the court grants immunity. Congress rejected an administration bill giving this power to the Attorney General and passed a law

transferring this power to the District Court. The statute is therefore unconstitutional since the grant of immunity is not a judicial function. However, should this Court hold otherwise, the order must be reversed since (1) the District Court accepted as binding upon it the Attorney General's decision to grant immunity, and (2) the only record was that made by petitioner who showed that the investigation was in bad faith and that he might be prosecuted for perjury.

8. Even if the grand jury section of the statute were not objectionable for the foregoing reasons, it would fall as part of an otherwise invalid statute. The other section relating to congressional committees clearly presents no case or controversy. Congress would not have passed one section without the other.

9. The order below is invalid because it permits an inquiry into political affiliations which are irrelevant to a bona fide espionage investigation and which are protected by the First Amendment.

10. Finally, the order fails to comply with the statute and to give adequate protection to the witness because it neither contains a grant of immunity nor states what immunity is given to the witness.

Argument

POINT I

The statute is unconstitutional in that it compels a witness to testify against himself.

The history, purposes and policy of the privilege have been too often told for repetition here. *Quinn* v. *United States*, 349 U. S. 155 (1955); *Boyd* v. *United States*, 116

U. S. 616 (1885); *Twining v. New Jersey*, 211 U. S. 78 (1908).*

It is sufficient to recall that in England, the privilege emerged in response to the oath *ex officio* employed by the Star Chamber and by the High Commission in political and religious persecutions respectively. The problems were the same, for beginning with Henry VIII "the distinction between church and state, between heresy and treason, between non-conformance and sedition becomes increasingly obscure" (Siebert, *Freedom of the Press in England, 1476-1776* (pp. 48-49) (1952)). James I recognized this with his "No Bishop, No King". (Davies, *The Early Stuarts*, p. 68, (1949)).

The reason for the privilege is dramatized by Charles I's letter to the High Commission charging that the Puritans had "withdrawn themselves from their Obedience to our Ecclesiastical Laws, into several ways of Separation: Sects, Schisms, and Heresies" and had "grown to that obstinacy and disobedience, that some of them refused to take their Oath, and others being sworn, refuse to answer . . . ." (1 Hazard, *State Papers*, 428).

That dissent is the context of the privilege is shown by Coke's writs of prohibition against the ecclesiastical courts and his strictures against the oath *ex officio*, *Edwards' Case*, 13 Co. Rep. 9, 77 Eng. Rep. 1421 (1609); Oaths *Ex Officio*, 12 Co. Rep. 26, 77 Eng. Rep. 1308; by the historic prosecution of John Lilburn for seditious books resulting in abolition of both Star Chamber and High Commission (3 How. St. Tr. 1315 (1637); 8 Wigmore, *Evidence* (3d Ed. 1940) sec. 2250); by the Declaration of the Army, during the Puritan Revolution, against the oath *ex officio* (Pittman, *supra*,

* See particularly: Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England* (Essays in History and Political Theory in Honor of Charles Howard McIlwain) 1936; Pittmann, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Virginia Law Review 725 (1935).

at 773); and by the repeated assertion of the privilege in the state trials which occurred during and after the Revolution. *E.g., King Charles' Trial*, 4 How. St. Tr. 993, 1101 (1649); *Scroggs Trial*, 5 How. St. Tr. 1034, 1039 (1660).

In this country, the privilege likewise emerged in opposition to the established church and political authority. Thus, for example, examinations in Governor Andros' court were criticized as "unreasonably strict, and rigorous and very unduely ensnaring" (*Narratives of the Insurrections* (1691) 246). The privilege was asserted by Thomas Maule who was charged with publishing seditious matter against the clergy (1 Chandler, *Criminal Trials*, 141, 144) and by William Bradford charged with printing the Pennsylvania charter (Wallace, *Trial of William Bradford*, p. 49).

It must therefore be recognized in construing the constitutional privilege that its purpose was in a very real sense the protection against Church and State of the freedoms which today we call First Amendment rights.* This Court has recently noted "the close relationship between the First Amendment and the privilege against self-incrimination." *Quinn* v. *United States*, supra at ftn. 31. This is not to say that it is to be limited to the protection of such rights, but that its most liberal construction is required in such cases.

The Fifth Amendment to the Constitution of the United States provides that "No person * * * shall be compelled in any Criminal Case to be a witness against himself." We should have read this language to mean that compulsory testimony is prohibited, regardless of the considerations offered, and that, while a voluntary arrangement to testify in return for immunity may be valid and enforceable, it

* Similarly with respect to the Fourth Amendment whose origins are found in the fight of Wilkes for a free press. It is significant that this Court has read the constitutional privilege of the Fifth Amendment and the search and seizure provisions of the Fourth together *Boyd* v. *United States*, 116 U. S. 616 (1885).

way not be compelled. In the words of Judge Gaston in the Court below, it is "a circuitous attempt to circumvent the Constitution by a short-cut legislative statute amending the Fifth Amendment". (R. 60).

This was the view of four justices of the Supreme Court, dissenting in *Brown* v. *Walker*, 161 U. S. 591, 610 (1896). The first dissenting opinion states:

> "It is too obvious to require argument that, when the people of the United States, in the Fifth Amendment to the Constitution, declared that no person should be compelled in any criminal case to be a witness against himself, it was their intention, not merely that every person should have such immunity, but that his right thereto should not be divested or impaired by any act of Congress."

More recently, Senator Hoey, in opposing the Immunity Bill said:

> "I am opposed to the entire bill. I believe we are going right in the face of the Constitution. The Constitution of the United States provides that no person shall be required to testify against himself. * * * We are granting to a committee of the Congress the power to take away the constitutional guarantees and rights to the protection which the Constitution gives us. We are saying, 'When you come before a committee and we grant you immunity, you have got to testify.' The Constitution says a man does not have to do that. I do not believe Congress ought to pass a measure such as the one which is before us. * * * " (99 Cong. Rec. 8352.)

However, since this Court upheld a federal immunity statute in *Brown* v. *Walker*, 161 U. S. 591, it is incumbent upon us to look into the reasons for the failure to give a literal interpretation to the language of the Fifth Amendment. That case involved issues so remote from those which gave rise to the privilege that it presented a most unsatisfactory basis for the enunciation of a great constitutional principle. It involved no questions of political or

religious dissent, but the enforcement of the Interstate Commerce Act. The background of that statute has been well described by Prof. Swisher:

> "By chartering companies, making grants of land, and lending money, Congress stimulated the construction of railroads, and, in seeking to protect the interests of the public in railroads built partly by means of public credit, it sought to exercise over such railroads control broader in scope than that then exercised over other railroads. * * * For the first time since the lapsing of the charter of the second Bank of the United States, in 1836, the government competed for power with corporations able effectively to challenge its authority." (*Swisher, American Constitutional Development*, 2d Ed. (1954), 389.)

But "[l]ittle concern for the public interest marked the use of government funds" (id., 391). As a result, Congress established an investigatory commission to look into the management of all the railroads that had received aid from the government in bonds.

> "The investigating commission * * * disclosed the systematic lootings of the railroads in question over a considerable period of years. Huntington, Stanford, Jay Gould, and many other prominent railroad men * * * gave testimony. But in spite of the facts disclosed by the testimony, witnesses were extremely reticent as to matters likely to prove embarrassing. Memories failed at convenient points, and records were conveniently missing" (id., 393-4).

Enforcement of the Interstate Commerce Act was therefore thought to require use of the existing Immunity Law, the Act of February 25, 1868, Rev. Stat. sec. 860. This law was declared unconstitutional in *Counselman v. Hitchcock*, 142 U. S. 547 in 1892 because it permitted prosecution with respect to the subject matter of the compelled testimony. Accordingly, Congress the following year upon the request of the Interstate Commerce Commission passed the Compulsory Testimony Act, 27 Stat. 443 (1893), 49 U. S. C. Sec. 46 (*Swisher, supra*, pp. 417-418). This law was up-

held in *Brown* v. *Walker*, by a majority of five on the ground that if the privilege were applicable, "the enforcement of the Interstate Commerce law or other analogous acts" would become impossible (161 U. S. 591, 610 (1896)).

The witness in *Brown* v. *Walker* was the auditor of the Alleghany Railway Valley Company, a railroad which was suspected of giving rebates or preferential rates to the Union Coal Company in violation of the Interstate Commerce Act. The witness was not an officer of either corporation or otherwise suspected of wrongdoing. It was obvious to the Court that he was in no personal danger of prosecution for crime, that he was attempting to protect his corporate employer and that there was no moral obloquy attached to the violation of the new regulatory law.

The cases that immediately followed *Brown* v. *Walker* involved the regulation of commerce and trade and in none did the court make an evaluation of first principles independent of *Brown* v. *Walker* (see e.g. *Hale* v. *Henkel*, 201 U. S. 43 (1906), *Wilson* v. *United States*, 221 U. S. 361 (1911)).

We believe that this Court erred in *Brown* v. *Walker* but that the error was understandable. It was upholding the regulation of corporate enterprise which was regarded as a competing government threatening to control our economy. The same problem led the Court shortly thereafter to deny the constitutional privilege to these business enterprises because of their corporate form. *Hale* v. *Henkel*, *supra*, a decision not followed in England, *Triplex Safety Glass Co.* v. *Lancegaye Safety Glass*, 108 L. J. K. B. 562; 2 K. B. 395, 409 (1939).

The present case and the present statute require the application of totally different standards (cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, fn. 4 (1938)). The statute refers to "treason, sabotage, espionage, sedition, seditious conspiracy", the very type of criminal matters that gave rise to the privilege. In the light of recent

developments, the words of Judge Grosscup, who declared unconstitutional the Compulsory Testimony Act of 1893, take on a prophetic ring:

> "Happily, the day when this immunity is needed seems to be over. It is difficult for us, who live in a time when there are few, if any, definitions of crime that do not meet with the approval of universal intelligence and conscience, to appreciate these conceptions of our fathers. The battle for personal liberty seems to have been attained, but, in the absence of the din and clash, we cannot comprehend the meaning of all the safeguards employed. When we see the shield held before the briber, the liquor seller, the usury taker, the duelist, and the other violators of accepted law, we are moved to break or cast it aside, unmindful of the splendid purpose that first threw it forward. But, whatever its disadvantages now, it is a fixed privilege, until taken down by the same power that extended it. It is not certain, either, that it may not yet serve some useful purpose. The oppression of crowns and principalities is unquestionably over, but the more frightful oppression of selfish, ruthless, and merciless majorities may yet constitute one of the chapters of future history. In my opinion, the privilege of silence, against a criminal accusation, guaranteed by the fifth amendment, was meant to extend to all the consequences of disclosure." *United States* v. *James*, 60 Fed. 257, 264-5 (1894).

The privilege, as we have seen above, was intended to protect freedom of speech and creed. The Fifth Amendment thus buttresses the First. The present statute, by compelling testimony in areas protected by the First Amendment violates the latter. If persons can be compelled to testify to their dissident beliefs and unpopular associations, a normal sense of caution will induce them to refrain from both, thus surrendering their First Amendment rights.

A return to the literal meaning of the Fifth Amendment is required, at least in cases of this type, if the privilege is to retain any of its original meaning and vigor. We need

not remind the Court that the privilege is more than a personal right, that it is the foundation of our accusatorial system of justice. It protects the individual against the collective power of the state. Indeed, it does more, for it reflects an ethical judgment, a revulsion against the self-degradation that comes from compulsory confession of non-conformity. This was well expressed by the leading protagonist in the development of the privilege:

> "* * * there was an inquisition Oath tendered unto me (which I refused to take) on four several days; the sum of which oath is thus much: 'You shall swear that you shall make true answer to all things that shall be asked of you: so help you God!' Now this oath I refused as a sinful and unlawful oath * * *. It is an oath against the law of the land * * *: And also it is expressly against the Petition of Right, an act of parliament enacted in the 3d and 4th year of our king. Again, it is absolutely against the law of God; for that law requires no man to accuse himself; but if anything be laid to his charge, there must come two or three witnesses at least to prove it. It is also against the practice of Christ himself, who, in all his examinations before the high priest, would not accuse himself, but upon their demands, returned this answer, 'Why ask you me? Go to them that heard me'." *The Trial of John Lilburn and John Wharton*, 3 How. St. Tr. 1315, 1331-2 (1637).

POINT II

The statute is unconstitutional in that it exposes the witness and his family to irreparable injury beyond anything contemplated in *Brown* v. *Walker*.

The Immunity Act of 1954 involves political crime and that in a period in which the political dissenter is subjected to social, economic, physical or other injury beyond the conception even of our forefathers. One would indeed have to be that "blind" court * not to take judicial notice

* *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 37 (1922).

of the destruction of civil liberties this past decade. That too is why *Bryan v. Walker* does not answer petitioner's attack upon this statute. For the auditor in that case could resume his job the day after testifying before the grand jury, his personal safety not threatened, his reputation and community status unaffected, his children unharassed in schooling, home or playground.

The problem is very different today for the political dissident because of the climate of public opinion and the punitive sanctions operating against him. Today, with rare exceptions based upon wealth or other special circumstances, he is at the mercy of an increasingly closed society, in a sense unknown to earlier generations of Americans. He is literally faced with the problem of survival because so many areas of employment and living are controlled by government and other powerful institutions able to enforce rigid standards of conformity.

It is for this reason that the Immunity Law promises more than it can give. It fails to give true immunity in three principal sectors of our national life—that controlled by the federal government, that under local government influence and that in which so-called private groups dominate the individual's existence. As Chief Judge Clark said of this law below:

> "It undermines and so far forth nullifies one of the basic differences between our justice and that of systems we contemn, namely the principle that the individual shall not be forced to condemn himself. Practically, as we know, no formal immunity can protect a minority deviator from society's dooms when he departs from its norms" (R. 59).

A. Federal disabilities.

The Internal Security Act (64 Stat. 987 (1950), 50 U. S. C. Secs. 784, 785), and various federal executive orders prohibit the employment of so-called subversives in government or defense facilities and make it unlawful for

them to apply for or use passports. If the President declares the existence of "an internal security emergency", the Attorney General can intern anyone as to whom "there is reasonable ground to believe that such person will probably engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage". (50 U. S. C., Secs. 812, 813).

Employment as a longshoreman or in the privately-owned merchant marine is subject to governmental screening (64 Stat. 427 (1950); 50 U. S. C., Sec. 191). Since June 1954, the Defense Department has promulgated an elaborate series of security regulations directing the discharge of inductees under less than honorable conditions for associations antedating their induction. (See, e.g., Department of the Army, Special Regulations, S. R. 600, 220-1).

Even officials of international organizations, such as the United Nations, have been subjected, as American citizens, to investigations by an International Organizations Employees Loyalty Board, created by Executive Order 10459, 18 F. R. 3183, June 4, 1953.

The sanctions are not limited to governmental employees. The Federal Communications Commission has proposed a rule that operators in broadcasting stations pass loyalty tests (Federal Communications Commission, Docket Nos. 11060-61). It has withheld a broadcasting station license on political grounds. (Kenyon, *Politics in the Lamb Case*, 181 The Nation 12 (1955).

The use of grants for research to university professors has added another sector to federal control with implications so serious that at least one university will not accept such grants.

A recently enacted statute deprives of citizenship persons convicted of Smith Act violations (68 Stat. 1146, 8 U. S. C., Sec. 1481 (1954)). This may be the precursor of similar sanctions applied to persons compelled to make such admissions to congressional committees and grand juries.

It may reasonably be estimated that at least 15 million people are directly affected by security regulations imposed by the federal government.

Obviously the immunity statute was not intended to and cannot relieve of these disabilities those who testify pursuant to its provisions. This point indeed was made by the minority of the House Committee on the Judiciary (H. Rep. 2606, 85d Cong. 2d Sess., p. 12). The Act was not intended to make admissions of Communist Party membership before a grand jury a key to passport eligibility, to employment in the government or in defense facilities, to broadcasting station licenses, to retention in the armed forces and to freedom from concentration camps. It was not intended to permit such witnesses to remain officers of labor unions and to permit such unions to use the facilities of the National Labor Relations Board. (See Labor Management Relations Act, 1947, 61 Stat. 136, 146 *et seq.*, 29 U. S. C. 141, 159(h).)

In all candor the Government must concede that all of the disabilities created by statute and regulation will continue despite the testimony under the alleged protection of the statute. Therefore, true immunity was not intended nor can it be given by the law.

B. State disabilities.

We discuss below in Point IV the constitutional problems arising from state criminal prosecution. In addition, there are state laws and municipal ordinances (a) requiring communists to register, (b) requiring state and city teachers and other employees to take loyalty oaths, and (c) subjecting state and city employees to investigation and discharge for political reasons. There are legislative investigations in imitation of those of the House Committee on Un-American Activities. (See Emerson and Haber, *Political and Civil Rights in the United States*, 1952, pp. 568-600.)

The total punitive impact of these local regulations and investigations upon the witness compelled by federal au-

thority to testify is truly terrifying. Since the witness' admissions of political guilt may be the prelude to similar local subpoenas, test oaths and loss of employment, he is receiving a meaningless "immunity". He has in fact surrendered his right to local employment and his freedom from local harassment precisely because of such revelations. This dilemma points up the mockery of the "immunity" concept in relation to "subversive activities" today.

C. Private disabilities.

In addition to the formal governmental sanctions, those exercised by the community and by private groups are so tremendous as to challenge attempt at brief discussion. They include expulsion from labor unions, loss of private employment, discrimination in housing and schooling and public opprobrium. This Court's conception of trade unions as public utilities, thus required to file non-Communist affidavits in return for governmental favors, *American Communications Ass'n* v. *Douds*, 339 U. S. 382 (1950), and the Communist Control Act's even more drastic conception of unions as instruments of the state (68 Stat. 775, 777, 50 U. S. C. Sec. 841, *et seq.*) has turned the loss of union membership from a private to a public sanction. It brings us beyond the warnings of Professor Hale against those private groups who exercise governmental power (Robert G. Hale, *Freedom Through Law* (1952)).

Automobile owners have found their insurance cancelled, parents have been removed from activity in parent-teacher associations, houses have been stoned, the custody of children has been determined in recent lawsuits by the politics of their parents. Are these to be dismissed as "private" sanctions?

If the privilege is to have any meaning in the current context, these sanctions *must* be regarded as reason for invoking the privilege. In an analogous period of religious oppression, the 18th Century, the English equity courts allowed witnesses to be silent where admissions of papacy would result in property loss. *Harrison* v. *Southgate and*

Mordaunt, 2 Ves. Sen. 389, 28 Eng. Rep. 249, 252 (Ch. 1751), or where ecclesiastical censure would follow, *Finch v. Finch*, 2 Ves. Sen. 492, 28 Eng. Rep. 315 (Ch. 1752), or where a parliamentary seat was at stake, *Honeywood v. Selwyn*, 3 Atk. 276, 26 Eng. Rep. 961 (Ch. 1744).

Where the effect of political heresy is as serious as it is today, the dissenter is subject to penalties and forfeitures which are more drastic than criminal prosecution. This is not the place for a complete review of the private employment opportunities of a political dissenter in the present political atmosphere. It is sufficient to say that employment in the entertainment industry, in a private educational institution, on a newspaper, in the advertising industry, as a longshoreman, and in many other occupations, is effectively closed. Only the most menial and low-paying work is now available to many persons who have been branded as subversive by congressional committees, administrative agencies, or the daily press. Indeed, it might well be said that to many such persons the threat of criminal prosecution is the least of their concerns. (See Note, 63 Yale L. J. 954 (1953).)

The situation is radically different from the purely theoretical issue of public disgrace considered irrelevant by a majority of this Court in *Brown* v. *Walker*. We are dealing here with what one writer, discussing a similar period in the history of another country, calls "the tyranny of public opinion" a phenomenon in which the victim "risks being rejected by his own community and being expatriated in his own country." (Halasz, *Captain Dreyfus* (1955) 124.) This is indeed the revival of the institution of *infamia* in Roman and Canon law. (Mitchell Franklin, *Infamia and Constitutional Civil Liberties*, 14 Lawyers Guild Review 1 (1954); Vincent N. Tatarczuk, *Infamia at Law*, Canon Law Studies No. 357, Cath. Univ. of Amer. Press, 1954; Frank J. Redlinger, *The Canonical Effects of Infamia of Fact*, Canon Law Studies No. 353, Cath. Univ. of Amer. Press, 1954).

POINT III

Even the danger of federal criminal prosecution remains.

Our previous point discussed injuries not strictly criminal in nature, although even there the registration and oath provisions of current day security regulations make the distinction a doubtful one. However, there are two areas in which the operations of the Immunity Act will facilitate rather than foreclose federal criminal prosecutions.

A. The continuing crime.

The first problem arises from the constant use of the conspiracy concept in prosecutions for political crime despite the cogent judicial warnings against that weapon (Mr. Justice Jackson, concurring in *Krulewitch* v. *United States*, 336 U. S. 440, 445 (1949)). In these cases it is standard practice to introduce evidence long antedating the overt acts for the purpose of showing the development of the conspiracy (*Dennis* v. *United States*, 341 U. S. 494 (1951), affirming 183 F. 2d 201). The witness who is compelled, as here, to testify to such distant conduct may anticipate that it will be used against him, directly or indirectly, in a prosecution for violation of law occurring subsequent to his testimony. Surely the government is not granting him immunity against prosecution for *future* violations of law. *United States* v. *Kahriger*, 345 U. S. 22 (1953). Indeed, witnesses under immunity acts have been subsequently prosecuted for continuing crimes upon the basis of leads given by their compelled testimony and otherwise. *United States* v. *Smith*, 206 F. 2d 905 (C. A. 3, 1953); *United States* v. *Stifft*, 186 F. 1002 (N. D. Ill. 1911); *United States* v. *Frontier Asthma Co.*, 69 F. Supp. 994 (W. D. N. Y. 1947); *contra, United States* v. *Moore*, 15 F. 2d 593 (D. C. D. Ore. 1926). And can it be denied that his revelations as

to the past may be useful to the prosecution either as a reason for keeping him under surveillance and thus obtaining "leads" to be used against him, or as background evidence in a future prosecution?

No one can reasonably seek immunity from prosecution for future crime. There is no comparable problem in cases involving commercial crime such as tax evasion. The witness there knows what he is doing when he leaves the witness stand to file another false tax return. That is not true of the witness before a grand jury investigating violations of the Smith Act, 54 Stat. 670-671, 18 U. S. C. 2385, the Foreign Agents Registration Act, 52 Stat. 631, 22 U. S. C. 611, and the like. A sharp line cannot be drawn between a man's political ideas and associations before and after his testimony. The line between the permissible and the forbidden is always uncertain in the realm of ideas and advocacy. The witness cannot know until a jury's verdict tells him so that his conduct violated a statute of this type. His earlier testimony does not immunize, it immobilizes him. If he is to have safety after his testimony, he must refrain from writings, speeches and associations that might be construed as criminal. The Immunity Law becomes a censorship law. It is the return to prior restraint, a noxious doctrine we had thought long behind us.

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*We are reminded of this by a striking passage in Waldo Frank's biography of Simon Bolivar which relates the attack by a Spanish general upon the revolutionists:

> "Monteverde moved into Caracas and at once broke all the promises he had signed so lightly because he did not intend to keep them. Republicans were imprisoned and shot, properties were seized, the port of La Guaira was closed, no one could leave. To injury the Spaniard added insult of sophistication. He had agreed to punish no one for his political opinion. This held to the moment of *signing*, but what of *the moment after*? What if the heretics and traitors continued to think? For this, now, they should be punished. He had promised to enforce the Constitution of Cadiz. It gave no rights of citizenship to *criminals*. Venezuelans were criminals, *ergo* [illegible]." (Frank, *Birth of a World* (1951) 62)

B. The perjury prosecution.

The witness compelled to testify under this statute subjects himself to the very real danger of prosecution for perjury based upon his compelled testimony. The statute expressly leaves him open to such a prosecution and in that respect denies him his constitutional privilege.

This has not generally been regarded as a ground for preserving silence. (see *Glickstein v. United States*, 222 U. S. 139 (1911)). However, a more beneficent rule must apply in the field of political crime if the privilege is not to prove a cruel hoax. For these problems are very different from those in the field of commercial or other crime. As Chief Judge Clark said below:

> "And realistically viewed there is much in the defendant's contention, that at the end of the road is a charge of perjury supported by the oath of a renegade or paid informer" (R. 605).

There is historical support for the contention herein made. The proceedings of the Bishops of Lincoln and Worcester for requiring men to take the oath were based upon the "danger of perjury by forcing them to answer on oath in regard to the secret private actions and opinions of others wherein they might easily be mistaken." Maguire, *supra*, p. 206; Morgan, E. M., *The Privilege against Self-Incrimination*, 34 Minn. Law Rev. 1, 3 (1949).

Similarly, Coke pointed out that "laymen for the most part are not lettered, wherefore they may easily be inveigled and entrapped and principally in heresy and errors of faith." * * *" *Oaths Ex Officio, supra.* Thomas Lidd's case shows the use made of perjury charges in connection with the oath *ex officio*. He testified before an ecclesiastical court after objecting to the oath and then was charged before the High Commission with perjury. There he was imprisoned for refusing to take the oath. The Kings Bench issued a writ of habeas corpus "on the grounds that the

High Commission had no right to force men to accuse themselves on oath or to inflict the temporal penalties of fine and imprisonment." Maguire, *supra* at 225, citing *The Argument of Master Nicholas Fuller in the Cases of Thomas Udall and Richard Maunsell, his Clients*, 1697).

It has also been objected that the oath *ex-officio* "would place a witness under the strongest temptation to commit the crime of perjury . . . ." (Starkie, *Evidence*, 19th Amer. Ed., 40-41). Chancellor Walworth of New York has said:

> "I may be permitted to doubt whether it is strictly consistent with the spirit of our institutions and of an enlightened legislation, to tempt the conscience of any man so far as to compel him to make a disclosure . . . " (of usury for which immunity was given).
>
> *Perrine v. Striker*, 7 Paige 598, 601 (1839).

Professor Mitchell Franklin has suggested that the Fifth Amendment owes much to the encyclopedist movement in eighteenth-century France (Franklin, *The Encyclopédiste Origin and Meaning of the Fifth Amendment*, 15 Law. Guild Rev. 41 (1955), 53-55). If this be so, it is another point where the struggle against the oath involved a concern for perjury. "Let the oaths or rather the perjuries required from the accused be suppressed" said the *Cahier du Tiers* (Esmein, *A History of Continental Criminal Procedure* (1914) 398).

The government will argue that every witness must assume that he will not be prosecuted for truthful testimony, and that if he is prosecuted, he is reasonably assured of an acquittal. We challenge this argument, even in its general form, for the reasons given by the dissenting justices in *Brown v. Walker*:

> "His position in this respect is not that of ordinary witnesses testifying under the compulsion of a subpoena. His case is that of a person who is exempted by the Constitution from testifying at all in the matter. He is told, by the act of Congress, that he must never-

> theless testify, but that he shall be protected from any prosecution, penalty or forfeiture by reason of so testifying. But he is subjected to the hazard of a charge of perjury, whether such charge be rightfully or wrongfully made. It does not do to say that other witnesses may be so charged, because if the privilege of silence, under the constitutional immunity, had not been taken away, this witness would not have testified, and could not have been subjected to a charge of perjury" (*supra* at 622).

However, the government must concede that in political cases there is an overwhelming danger of a perjury prosecution. It is standard operating procedure for the government to prosecute for perjury persons whom it desires to but cannot prosecute for such crimes as espionage, sedition and the like. The Taft-Hartley law has been a fruitful basis for this type of prosecution of union officers. Witnesses have been called before congressional committees and grand juries for the apparent purpose of prosecuting them for perjury in denying the serious charges against them. Three famous prosecutions should be enough to prove our point. *United States* v. *Hiss*, 185 F. 2d 822 (C. A. 2, 1950), *cert. den.* 340 U. S. 948; *United States* v. *Remington*, 191 F. 2d 246 (C. A. 2, 1951), *cert. den.* 343 U. S. 907 (1952); *United States* v. *Lattimore*, 215 F. 2d 847 (App. D. C., 1954).

Indeed, in an investigation of United Nations personnel, conducted by a federal grand jury in the Southern District of New York, an assistant United States District Attorney stated:

> "* * * In this particular case an indictment was not possible right then for various reasons, namely Kaplan had refused to testify so there was no testimony which you could attack from a perjury standpoint as far as espionage was concerned." (Hearings before the Special Subcommittee to Investigate the Department of Justice, House Committee on the Judiciary, on H. Res. 95, 82nd Cong. 2d Sess. (1952) 1655.)

It is not as if our tripartite system of government were smoothly functioning, with grand juries investigating crime and congressional committees determining the need for legislative action. Each has subpoenaed union officials on the eve of union elections with the obvious intention of affecting the election results by newspaper publicity concerning the attempt. One attack by a grand jury in the Southern District of New York has led to the judicial censure and expungement of its presentment. *Matter of United Electrical and Radio Machine Workers of America*, 111 F. Supp. 858 (S. D. N. Y. 1953). One appellate court has recently suggested that it is improper for the grand jury to subpoena an intended defendant. *Powell v. U. S.*, App. D. C. No. 12463 (1955). This rule would permit of ready extension to the perjury cases where the element of entrapment is even clearer.

This misuse of these systems of interrogation make an unfounded prosecution for perjury a real danger which is increased by the widespread use of informers and the vagueness of such terms as membership, associations, and belief in the area of political crime.

The prevalent use of informers and their unreliability in political cases is too well established for discussion here. Informers have always been recognized as a danger in political prosecutions. A whole flock of informers arose in connection with the enforcement of the Test Oaths of 1606 and 1610 directed against the Catholics and the Licensing Act of 1662 directed against the Puritans (Ryan, *The Jacobean Oath of Allegiance and English Law Catholics*, 28 Cath. Hist. Rev. 159 (1942); Green, *A Short History of the English People* (1879) 610; Koeningsberg & Stavis, *Test Oaths: Henry VIII to the American Bar Association*, 11 Lawyers Guild Review 111 (1951)).

Historians have long discussed the danger of informer testimony (see *e.g.*, 2 May, *Constitutional History of England* (1863) 277)). The commentators in increasing volume

today have reflected the seriousness of the problem (see particularly Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agents Provocateurs*, 60 Yale L. J. 1090 (1951)).

The damage done by informers is reflected in recent decisions which have set aside Smith Act convictions or refused orders of deportation. *United States* v. *Flynn*, 30 F. Supp. 413 (S. D. N. Y., 1955); *United States ex rel. Brzozicki* v. *Helton*, 222 F. 2d 840 (C. A. 7, 1955).

The subject matter of the inquiry creates an additional danger for the witness in political cases. One obvious trap lies in the kind of detailed information, often lying in the depths of the past, which is asked of witnesses in political cases. See *United States* v. *Lattimore*, *supra*.

In addition the inquiry relates to such matters as membership, belief, and affiliation. Thus, Owen Lattimore was indicted for his denial that he was a "sympathizer" of the Communist Party, and Harvey O'Connor was indicted for refusing to answer so vague a question as whether he had "ever been a member of the Communist conspiracy" (*U. S.* v. *O'Connor*, D. C. Crim. No. 1650-53). The Court of Appeals for the Ninth Circuit has held that in a criminal prosecution for perjury in denying Communist Party membership, Harry Bridges' views on trade with China were proper evidence of such membership for the jury. *Bridges* v. *United States*, 199 F. 2d 811, 839, ftn. 9 (C. A. 9, 1952), rev'd 346 U. S. 209 (1953). The Taft-Hartley Law requires union officers to execute affidavits that they do not *believe* in the overthrow of the Government (61 Stat. 136, 29 U. S. C. Supp. I, 141 *et seq.*) (1947). One union official has already been convicted of perjury for denying membership after he openly resigned, the Government's theory being that resignations are not possible (*Gold* v. *United States*, App. D. C. No. 12352, appeal pending). Another union official was acquitted of the charge of membership and found guilty because he was still "affiliated" with the Com-

munist Party (see *United States* v. *Bryson*, 16 F. R. D. 477).

All this points up the necessity of permitting silence in a period when beliefs and acts of association are considered relevant to public inquiry and a basis for prosecution.

POINT IV

The statute does not give complete immunity because the witness is subject to prosecution for state crime.

When the Senate passed S. 16 on July 9, 1953, it was of the opinion that it was not required to, could not and did not intend to give immunity for state prosecution of crime (99 Cong. Rec. 4743, 8340-8357). However, the House Committee on the Judiciary had a different view. It believed it desirable to give immunity from State prosecution. It was not sure that it could do so. It nevertheless wrote a statute which it hoped was broad enough to achieve this effect. It is doubtful whether the statute, as written, achieves this objective. In any event, it is certain that it could not constitutionally do so.

The Committee stated:

> "The answer to the precise question is not too clear. See *Brown* v. *Walker*, *supra*; *Counselman* v. *Hitchcock*, *supra*; *Hale* v. *Henkel* (201 U. S. 43 (1906)); *U. S.* v. *DiCarlo* (102 F. Sup. 597 (N. D. Ohio 1952); *Adams* v. *Maryland*, *supra*. In any event, the question can only be resolved by a decision of the Supreme Court. *Even though the power of Congress to prohibit a subsequent State prosecution is doubtful, such a constitutional question should not prevent the enactment of the recommended bill.* The language of the amendment that 'no such witness shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so

compelled to testify, after having claimed his privilege against self-incrimination, to testify or produce evidence, *is sufficiently broad to bar a subsequent State prosecution if it be determined that the Congress has the constitutional power to do so.* In addition, the amendment recommended provides the additional protection as set forth in the Adams case, by outlawing the subsequent use of the compelled testimony in any criminal proceeding—State or Federal.

"By the use of these two distinct concepts, the committee believes that the fullest protection that can be afforded the witness will be achieved." (Emphasis supplied.) (H. Rep. 2606, 83rd Cong., 2d Sess., p. 7.)

A. Read literally, the statute does permit state prosecution.

The proponents of immunity legislation will concede that its validity depends upon immunity both from use of the compelled testimony and prosecution on the subject of the testimony. *Counselman* v. *Hitchcock*, *supra*.

The instant law appears on its face to treat these two problems differently, in so far as state prosecutions are concerned. Section (c) seeks to immunize the witness against the use of his testimony in state criminal proceedings. However, it does not immunize the witness against prosecution in a state court in which the testimony itself is not used. For the term "in any court" relates only to the use of the testimony and not to the forum of prosecution. It continues that aspect of the statute which existed prior to the 1954 amendment, which was upheld in *Adams* v. *Maryland*, 347 U. S. 179 (1954).

The District Court was of the opinion that the statute granted immunity against State prosecution for crime (R. 35). Its reliance upon *Brown* v. *Walker*, *supra*, is certainly misplaced, since the statute there involved lacked the dichotomy found in the Immunity Law between the use of the testimony itself and a prosecution on the same subject, and the Supreme Court's remarks on this point certainly were pure dictum. Secondly, it is significant that the Sen-

ate, in its extensive earlier debates on S. 16, rejected the thought of immunity against State prosecutions (99 Cong. Rec. 4742-3). When H. R. 6899 reached the Senate a year later, it never went through the Senate Judiciary Committee and was summarily handled upon the floor without any repudiation of the earlier view. While it is true that the new bill contained language different from the old, its language is at best ambiguous and it is doubtful that so great a reversal of position was intended by the Senate without a single word of explanation.

Adams v. *Maryland*, *supra*, did not grant immunity against State prosecution for crime and therefore does not support the court below. The concurring opinion of Mr. Justice Jackson emphasizes the limitation of the holding.

The clarity found by Judge Weinfeld in the language of this statute conflicts with the informed judgment of those responsible for legislation. Representative Emanuel Celler, now Chairman of the House Judiciary Committee, then a member of the subcommittee considering the bill, and its most formidable opponent, said:

> "The bill is so inexpertly worded, so carelessly drawn, so badly put together that the lawyers will have years of field days and the courts will be sorely put to it for years with cases in the effort to tell really what the legislation means. But I warned in committee that State prosecutors would be hobbled and impeded.
>
> "On the other hand they may not be impeded and State prosecution may ensue, in which event the immunity granted would be useless since not complete. I defy anyone to tell me from the terms of the bill whether the State can or cannot prosecute upon the testimony given wherein a crime was admitted. * * *" (100 Cong. Rec. 13326.)

Representative Dodd agreed that:

> "* * * no one can tell whether the immunity granted extends to prosecutions in the State courts and this is but one of the obscurities in the legislation." (*id.* 13328.)

The reasons for this obscurity are a matter of national scandal. This, like so much other of the recent so-called anti-subversive legislation, was rushed through Congress without any opportunity for deliberation. In this respect it has a most apposite progenitor in the earlier immunity legislation which had such unfortunate results.

The Immunity Act of 1954 was enacted shortly before the close of Congress. As Representative Dodd pointed out, it was "rushed through the House of Representatives in the closing hours of the 83d Congress under a suspension of the rules and with only 40 minutes provided for discussion and debate on the legislation" (100 Cong. Rec. 13328). See also the comments of Representatives McCarthy and O'Hara on this extraordinary haste (*id.* at 13331) and of Representative Doyle as to the absence of any printed hearings (*ibid.*). They have not been printed to this day. In the Senate, the bill was handled even more summarily, never going through the Senate Judiciary Committee which for years had bottled up other grand jury immunity bills, and being disposed of briefly on the floor, with Senator Lehman indicating his concern over the lack of opportunity for discussion (*id.*, 13998).

What wonder then that this law purporting to dispose of the most fundamental of rights should not only be drawn most ambiguously, but should not have been understood by the legislators themselves? We are aware of the presumption of regularity that attend the actions of all branches of government. But there must come a time when the realities of life overcome such a presumption. What more appropriate occasion is there for such an event than when historic constitutional guarantees are in jeopardy?

B. The federal government cannot grant immunity against state crime.

Assuming, however, that legislative history might be disregarded and that the statute prohibits all state prosecution for crime, we then face these fundamental problems: 1. Can Congress constitutionally interfere with this aspect of the state police power? 2. If not, is the witness given the immunity from prosecution to which he is entitled under the Fifth Amendment?

Congress cannot prohibit state criminal prosecutions in order to secure evidence of federal crime. So extraordinary a power has never been upheld judicially. It is true that this was one of the alternative premises in *Brown v. Walker, supra.* However, the other premises were more persuasive both to the Court and its successors, particularly the lack of any danger of state prosecution. This was not an unreasonable position in view of the limitation of the federal grand jury investigation therein to the subject of unlawful rebates under the Interstate Commerce Act.

In the subsequent cases on immunity laws, the Supreme Court never again suggested that the federal government had power to prohibit prosecution for state crime. See, *e.g., Hale v. Henkel*, 201 U. S. 43 (1906); *United States v. Murdock*, 284 U. S. 141 (1931). Instead, in each of those cases it relied rather upon the "two sovereignty rule," that each sovereignty is indifferent to the potential exercise of the other's punitive power. The finding of indifference has a necessary corollary in impotence since it is based upon a recognition of the sovereign independence of the states.

Mr. Justice Black has described "the problem of the federal power to interfere with enforcement of state laws through the device of granting immunity from state prosecution to witnesses in federal proceedings" as "replete with both practical and legal difficulties". *Feldman v. United States*, 322 U. S. 487, 497-8 (1944), footnote 8, dissenting opinion.

More recently, too, in discussing S. 16, the most competent legal advice to the Senate was that it could not grant immunity against state prosecution for crime (Senators George, 99 Cong. Rec. 4742; McCarran, *id.* 4743; Kefauver, *ibid.*; Hennings, *ibid.*; Morse, *id.* 8353-4; Cooper, *id.* 8349; *Former Attorney General Biddle*, *id.* 8343; Mr. John W. Davis, *id.* 8343-4; former Solicitor General Perlman, *id.* 8346).

As Mr. Davis said:

> "In spite of the decisions cited in the committee report, there seems still to remain some doubt whether a witness may claim privilege if his testimony might tend to incriminate him under State law. The bill S. 16 does not purport in express terms to grant immunity from prosecution or penalty under State law. The language of the majority opinion in *Brown* v. *Walker* (161 U. S. 591) to the contrary notwithstanding, there may still be doubt of the power of Congress so to provide" (99 Cong. Rec. 8343-4).

The District Court was of the opinion that investigations into crimes involving national security might have a different effect (R. 33). But this statute was not passed for reasons of national security. It began as a bill limited to congressional committees and it exempted the witness from prosecution for any crime. The provisions for investigations into so-called national security situations were a compromise which evolved in the course of the House Committee hearings upon the suggestion of two Congressmen who were otherwise inactive (100 Cong. Rec. 13323). Further, as appears from the statements made by Congressman Walter on the floor of the House, the bill was intended principally to aid the House Committee on Un-American Activities (100 Cong. Rec. 13324). Surely no one will suggest that the investigatory power of that or any other congressional committee is based upon national security and could render state law inoperable.

The District Court, in holding that where national security is involved the federal government may grant immunity, evidently draws this conclusion from the decision of the Pennsylvania Supreme Court in *Commonwealth* v. *Nelson*, 377 Pa. 58, 104 A. 2d 133, *cert. grant. sub. nom. Pennsylvania* v. *Nelson*, 348 U. S. 814. The *Nelson* case is pending before this Court. At most it merely holds that state sedition laws are rendered inoperable by the passage of federal laws which occupied the field. It did not render inoperable other state laws and would leave a witness who testified before a federal grand jury still open to state prosecution under other statutes, *e.g.*, perjury, fraud, etc.

In any event, principles of supersedure which apply to federal substantive legislation have never been extended to a grand jury's right of inquiry. Article VI of the Constitution establishes the supremacy of federal law, not of federal investigations by grand juries or congressional committees. It is one thing for Congress to occupy a specified field, thereby eliminating state regulation therein. It is quite another to give a federal official the power to determine which individuals should not be punished for violating valid and otherwise enforceable state laws.

C. The Constitution requires protection against state prosecution.

We therefore turn to the second question: whether one who is not granted immunity from state prosecution can be compelled by the federal courts to testify against himself. We believe that the answer is clearly in the negative. The older cases, of course, were to the effect that immunity is not complete unless it covers state prosecutions for crime. This was the view of Chief Justice Marshall in *U. S.* v. *Saline Bank*, 1 Pet. 100, 7 L. Ed. 69 (1828), and of Mr. Justice Holmes in *Ballman* v. *Fagan*, 200 U. S. 186 (1905). (See also *U. S. of America* v. *McRae*, L. R. 4 Eq. 327 (1867), affirmed as to the relevant part in L. R. 3, Ch. App. 79, 87

(1868).)* It is the view which has been taken most recently by state and federal courts which have recognized the inadequacy, unreality and unfairness of the "two sovereignty rule." *U. S. v. DiCarlo*, 102 F. Supp. 597 (N. D. Ohio, 1952); *In re Watson*, 293 Mich. 263, 285 (1940); *Gould v. Gould*, 201 App. Div. (N. Y.) 674 (1922); Cf. *Marcello v. U. S.*, 196 Fed. 2nd 437, 442, C. A. 5 (1952). *United States v. Murdock*, 284 U. S. 141, while stating a contrary rule, expressly pointed out that nothing of state concern was involved. Like its predecessors it assumed that the possibility of state prosecution was fanciful.

Whatever may be the problem of a witness examined concerning railroad rebates, as in *Brown v. Walker*, or violations of federal regulatory statutes as in *Hale v. Henkel*, the danger to the federal witness from state prosecution for sedition and subversive activities is considerable. It is the states which, since World War I, have been most vigorous in the prosecution of persons for sedition, subversion, disloyalty and the like (see Gellhorn, *The States and Subversion* (1952)). Here it is fanciful to suggest that there is no real danger of State prosecution.

POINT V

The statute gives the District Court the power to grant immunity.

The statute, in describing the role played by the Court in the grant of immunity to a witness before a grand jury, provides that in cases involving the national security, the United States Attorney "upon the approval of the Attorney

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* A detailed analysis of the cases appears in J. C. Grant, *Immunity from Compulsory Self-Incrimination in a Federal System of Government*, 9 Temple Law Quarterly 57, 194 (1934-5) and in two articles by the writer of this brief, Boudin, *The Constitutional Privilege in Operation*, 12 Law. Guild Rev. 128 (1952) and *The Immunity Bill*, 42 Georgetown Law Journal 497 (1954).

General, shall make application to the court that the witness shall be instructed to testify * * * and upon order of the court such witness shall not be excused from testifying * * * on the ground that the testimony * * * may tend to incriminate him." The statute is silent upon the issues to be determined by the Court on such application.

The courts below were apparently of the opinion that under this statute the United States Attorney and the Attorney General alone were given the function of granting immunity and that the function of the court on such an application is the same as in the normal case of a recalcitrant grand jury witness, in which the application of the immunity statute is not involved. See, *e.g.*, *Carlson* v. *United States*, 209 F. 2d 209 (C. A. 1, 1954), and companion cases.

Petitioner, on the other hand, urges that the statutory language was not intended merely to restate the law of the *Carlson* case but that Congress intended to give to the District Court the duty of granting immunity to the witness, or at the least, of approving the propriety of the grant of immunity by the United States Attorney. Indeed, this precise point was the subject of extensive Congressional discussion in both the 82nd and 83rd Congresses, and, as we shall see, Congress considered and expressly rejected a bill which would have made the grant of immunity the exclusive function of the Justice Department. Moreover, that bill was rejected precisely because it did not require court participation in the grant of immunity.

Consideration of the background of the statute is necessary for a full understanding of the immunity law. Never before in this country have we had a general federal statute immunizing a witness for testimony before a grand jury. Nor have we had such a statute with respect to testimony before congressional committees, except for the five-year period from 1857 to 1862 (11 Stat. 155). The statute

relating to congressional committees (12 Stat. 333, 18 U. S. C. 3486), which was in force from 1862 to 1954 merely prohibited the use of the testimony itself and therefore did not give complete constitutional protection to the witness. *Counselman* v. *Hitchcock*, 142 U. S. 547.

In 1951 a campaign for the passage of a new immunity law got under way. Senator McCarran introduced a bill which provided for the granting of immunity to witnesses before congressional committees only (S. 1570, 82nd Cong. 1st Sess.).* That bill proposed that Congress should exercise the power of granting immunity. Members of the Kefauver Committee introduced a bill respecting witnesses before grand juries and courts (S. 1747, 82nd Cong. 1st Sess.).** That bill proposed that the Attorney General should exercise the power of granting immunity.

Neither bill passed because of grave doubts on two counts: first, the political and constitutional objections to any immunity law; and second, a dispute between the Attorney General and Congress as to which of them should exercise the power of granting immunity.

In the 83rd Congress the debate began anew. Once more Senator McCarran introduced his bill relating only to congressional committees and requiring only congressional action for the grant of immunity (S. 16, 83rd Cong. 1st Sess.).*** At the same time, Representative Keating introduced into the House a revised version of S. 1747 of the previous Congress. As revised, the bill covered wit-

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* The bill was reported Aug. 27, 1951, S. Rep. 717, 82d Cong., 1st Sess., 97 Cong. Rec. 10662, amended and passed 98 *id.* 9051, and then reconsidered, *id.*, 9052.

** S. 1747, 82nd Cong., 1st Sess. The Senate Judiciary Committee did not report the Bill. The Kefauver Committee however discussed it in its report, S. Rep. 725, 82nd Cong., 1st Sess., pp. 94-95 (1951).

*** The bill was reported April 20, 1953, 99 Cong. Rec. 3319, S. Rep. 153, 83d Cong., was repeatedly passed over at the requests of Senator Taft and others, *id.*, 4578-9, 4743, 6172, 7990, and finally passed the Senate on July 9, 1953, *id.* 8357.

nesses before congressional committees, grand juries and the courts, but carried over the provision contained in the earlier bill in specifying that only the Attorney General should have the right to grant such immunity (H. R. 6899, 83rd Cong. 1st Sess.).

So the Keating bill, copying verbatim from S. 1747 of the previous Congress, provided:

> "Whenever, in the judgment of the Attorney General, the testimony of any witness * * * in any case or proceeding before any grand jury or court of the United States, is necessary to the public interest, such witness shall not be excused from testifying * * * on the ground that the testimony may tend to incriminate him * * *. But such witness shall not be prosecuted * * *."

Neither S. 1747 in the 82nd Congress nor H. R. 6899 in the 83rd made any reference to a court order, although there can be no doubt that a court order would always be required if a witness was to be held guilty of contempt of court for refusal to answer questions put to him either by a grand jury or by a court. The reason for such requirement is set forth in detail in the *Carlson* case, *supra*, and need not be repeated here, since it is familiar ground. Certainly, the sponsors of the several immunity bills, in their failure to refer to the necessity of a District Court order, did not intend to dispense with the need for such an order as a pre-condition to a finding that a witness was guilty of contempt of court.

The Senate passed S. 16 on July 9, 1953 (99 Cong. Rec. 8357), and the House referred it to a sub-committee of its Judiciary Committee, which likewise had before it H. R. 6899 and several other House bills on the subject. Hearings were held, in the course of which Attorney General Brownell testified in support of H. R. 6899, the Keating Bill. He stated that he supported H. R. 6899 principally because it

> "places the ultimate responsibility for the granting of immunity upon the Attorney General of the United

States, irrespective of whether the witness is before a court, a grand jury or a Congressional body." (Hearings before House Committee on the Judiciary Sub-committee No. 1, June 8, 1954, Prepared Statement; see also Hearings, pp. 36, 39, 40, 44.)

He justified this on the basis of the various policy considerations involved in a grant of immunity which shall be discussed below in Point VI and concluded by stating:

> "For these reasons, I urge favorable consideration of H. R. 6899. If enacted, it would permit the granting of immunity to witnesses before either House of Congress, or its committees but it should vest the Attorney General, acting with the concurrence of appropriate members of Congress, with the authority to grant such immunity. If the testimony is sought for a court or grand jury, the Attorney General alone would be authorized to grant the immunity." (*Ibid.*).

The sub-committee recommended the Keating bill, although not without objection from Congressman Celler, who asserted that immunity should be granted by the District Court rather than by the Attorney General (Hearings, *supra*, pp. 12, 13, 624).

Had the story ended with the passage by Congress of the Keating bill, it would have been clear that the District Court had no role to play in the granting of immunity. In accordance with the usual procedure, the court of course still would have had to direct the witness to answer before his refusal could be construed as contempt. In making such a direction, no doubt, the court would have had to determine whether the witness had refused to answer in an inquiry relating to national defense and whether the Attorney General had in fact granted immunity; it would not have passed on the propriety of the grant of immunity itself.

But the story did not end here, for the House Judiciary Committee refused to accept the recommendation of its

sub-committee. Moreover, it refused to accept it precisely *because* it disagreed with the sub-committee on the identity of the agency to grant immunity. Said the full committee, in rejecting the sub-committee report:

> "While the Senate version of S. 16 contained no provision relating to grand jury or court proceedings, both the sub-committee and full Judiciary do. In that regard they are substantially the same in that both require the approval of the Attorney General that such testimony would be in the public interest. The full committee amendment requires that application be made to a court after the approval of the Attorney General that the witness be instructed to testify or produce evidence whereas under H. R. 6895 only the approval of the Attorney General was necessary prior to granting immunity." (H. Rep. No. 2606, 83rd Cong. 2nd Sess., p. 4.)

The Committee discussed the procedure to be followed in the case of a recalcitrant witness:

> "Finally, before the immunity is actually granted to the witness, [before a committee], the approval of the United States district court wherein the inquiry is being conducted is to be obtained. The court in reaching its decision will have the aid of the views and facts of both the congressional committee and the Attorney General" (*id.* at 8).

* * * * * * *

> "In cases before a grand jury or a court, similar precaution exists. * * *"

> "In all cases where the bill authorizes a grant of immunity after privilege has been claimed, there are at least two other independent but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill." (Ibid.)

Whether the testimony is required by a congressional committee or a grand jury, the "two other independent but interested parties" who must concur in the grant of immunity are the Attorney General and the United States District Court.

Congress did not trust the Attorney General to exercise the immunity power. We say this without any intention to reflect upon the present incumbent, for a similar power had been sought for Newbold Morris as a special prosecutor by President Truman and was rejected by the Congress (New York Times, February 15, 1952, pages 1, 10; February 20, 1952, page 1; February 21, 1952; Editorial, Baltimore Sun, February 18, 1952).

Indeed, it may also be said that the Attorney General did not trust congressmen to exercise their power. See, *e.g.*, the addresses of Attorney General McGrath (Address, Maryland Bar Ass'n, June 23, 1951) and of Attorney General Brownell (Address before the Law Club of Chicago, Nov. 6, 1953).

Hence one commentator said in distinguishing this law from all previous statutes:

> "* * * But the Attorney General and the Congress, impliedly less trustworthy, are subjected to the scrutiny of a federal district court before they may grant immunity." * * * (Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 Geo. Wash. L. Rev. 501, 509 (1955).)*

Prior to the inception of this litigation and the submission of the government brief in the District Court, there was no confusion as to the meaning of this bill. Representative Keating, who was manager of the bill reported out by the Judiciary Committee, said, in the course of the congressional debate on the bill:

> "* * * It does provide for the granting of immunity in both proceedings before congressional investigating committees and before courts or in grand jury proceedings, but it does not leave the final determination

* See also *Federal Anti-Subversive Legislation of 1954*, 55 Colum. L. Rev. 631, 647 (1955): "Probably the district court will exercise the same discretionary control over grants of immunity in court as in legislative proceedings."

> as to the granting of immunity in either the hands of the investigating committee or the Attorney General, but rather the court." (100 Cong. Rec. 13323.) *

Representative Keating went on to point out that the bill really had two parts, one having to do with witness before a congressional committee and the other having to do with witnesses before a grand jury or court. He summarized the provisions of the bill with respect to grand juries and courts by saying:

> "* * * In that case it says that if the United States Attorney in a particular area has a prosecution before him and feels that immunity should be granted to some prospective witness, he shall first get the approval of the Attorney General to the granting of that immunity and then shall appeal to the court and the court will pass on the question, and if convinced of the propriety, issue the order for immunity." (Ibid.)

He summed up this aspect of the bill by stating:

> "* * * It requires, in the case of congressional investigations, virtual agreement [as to the grant of immunity] between all three branches of the Government—legislative, executive, and judicial—before an effective grant of immunity is conferred. In court proceedings it requires approval of both the prosecutor and the court" (*id.* 13324).

Similar views were expressed by Representative Celler, an opponent of the bill (100 Cong. Rec. 13325) and by Representative Hyde, a supporter of it (id. at 13328).

Several months after the passage of the law, but a few weeks before the inception of this litigation, the Attorney General made perfectly clear his understanding of the meaning of the statute:

> "The immunity will be granted under the new law only on questions regarding espionage, treason and other crimes of subversion. It can only be extended to reluctant witnesses before Congressional committees

* See also his remarks to the same effect at 100 Cong. Rec. 13328.

and Federal Courts and Grand Juries—and only after they have been apprised fully of their rights and have refused to answer specific questions. The immunity will extend only to that line of questioning and no other. *It will be granted by a Federal District Judge*, after advice from the Attorney General, upon petition of a United States Attorney or a representative of Congress. It will be accompanied by a court order to the witness to answer the questions. Failure to answer will be subject to contempt action before the court, with whatever penalties the court deems necessary. Failure to answer fully and truthfully, of course, will be subject to prosecution for perjury."

(Brownell, *Address at Twentieth Century General Congress, General Society of Mayflower Descendants*, September 13, 1954, pp. 5-6, emphasis supplied.)

The Attorney General was not alone in this view of the Immunity Law. The late Mr. Justice Jackson of this Court obviously had this law in mind when he referred, in his *Godkin Lectures*, to "Recent trends to empower judges * * * to approve a waiver of prosecution in order to force a witness to give self-incriminating testimony * * *." (Jackson, *The Supreme Court in the American System of Government* (1954), 12.)

Professor Robert G. Dixon, the leading scholar in the immunity field, has said:

"The novel and disturbing feature of the 1954 immunity statute, which applies to congressional investigations and to federal grand jury and court proceedings, is that the discretion and power to grant immunity is transferred to the United States district courts * * * *." (Dixon, *supra*, p. 502).

The commencement of this litigation, however, faced the government with a serious dilemma. To apply the statute as had been intended by Congress might result in a decision that the law was unconstitutional; at the very least, it would require that the District Court take testimony on the basis

of which it might make a finding that it should approve immunity for the witness. That requirement might well pose difficulties for the government and might even result in embarrassment. Hence, the United States Attorney was constrained to repudiate the views of the Congress which passed the law and of the Attorney General and to argue that the statutory language meant that the role of the court was limited to a direction to the witness to answer. Immunity, argued the government, was not "granted by a Federal District Judge" as the Attorney General had publicly stated only a few weeks before, but by the United States Attorney and the Attorney General. The three year debate in Congress was ignored; the statute was read as if H. R. 6899 had been passed and the statutory language respecting judicial action was treated as surplusage or as an unnecessary reenactment of *Carlson* v. *United States*, *supra*.

The District Court accepted the government view. It first distinguished the language used in sections (a) and (b) of the Act, relating to witnesses appearing before congressional committees, from the language used in subdivision (c), relating to witnesses before grand juries and courts. In concluding that sections (a) and (b) required a judicial grant of immunity, while section (c) did not, the court assumed a preciseness in statutory language which rarely exists and which certainly could not be expected here in view of the haste with which the bill, several times quickly revised in the few days before passage, went through the House with limited debate. The District Court's technique has been described as "dubious, in view of the legislative history" (Note, 55 Colum. L. Rev. *supra*, at 657) and as "an ingenious construction" of the statute (Dixon, *supra*, at p. 502). The government will concede that neither dubiety nor ingenuity is a proper tool for the judicial construction of legislative action.

The District Court further found that the statutory history was "inconclusive" (R. 42), a finding inexplicable in view of the clear intent expressed over and over again, both

in the House Judiciary Committee report and on the floor of the House.

It cited the remarks of Representative Walter at 100 Congressional Record 13325 in support of its assertion that he took a view different from that of Representative Keating, cited above. There is nothing in that page of the Record to support the District Court's view. The page cited is devoted largely to the remarks of Representative Javits, who expressed his opinion that the function of the District Court would be limited to a consideration of the materiality of the question posed to the witness; and that the Court would not pass on the question of immunity. Representative Walter responded by saying: "I do not think so. I think this goes much further than that." This must have persuaded Representative Javits as to the construction of the bill, for he later stated: "The bill presented to us also gives the power to grant immunity to the courts in criminal cases * * * and in proceedings before grand juries." (100 Cong. Rec. 13330.) The government cannot derive much comfort from this portion of the Congressional debate.

Disregarding most of the language cited above from both the Judiciary Committee Report and the debate on the floor of the House, the District Court did comment on the language in the report which noted that:

> "In all cases where the bill authorizes a grant of immunity after privilege has been claimed, there are at least two other independent but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill."

Petitioner had argued in the District Court, as he does here, that the "two other independent but interested parties" who must concur in the grant of immunity are the Attorney General and the court. The court below refused to accept this reading and came to the conclusion that the two parties who must concur are the Attorney General and

the United States Attorney (R. 30). Leaving aside the question as to whether these two parties can properly be called "independent," this reading requires us to ignore the word "other" in the language cited. (Note, 55 Colum. L. Rev. 637, 648 (1955).)

The government argues that the petitioner seeks to prove that Congress intended to pass an unconstitutional statute and takes refuge in the familiar argument that this Court will not construe ambiguous statutory language in order to reach a finding of unconstitutionality.

As a general proposition, the rule is a valid one, but it is not applicable here. The statute here is not specific on the role of the Court in granting immunity, but there is no ambiguity at all in the legislative history. Not a word has been or can be cited to show that Congress intended to pass a statute which gave the power to grant immunity to the Attorney General and to the United States Attorney. Every word in the legislative history points to precisely the contrary result. Petitioner does not seek to distort language to bring about a holding of unconstitutionality; he seeks only to interpret the statute as Congress clearly intended. Otherwise there would be imposed on Congress a statute which it expressly and repeatedly refused to pass, merely in an effort to read constitutionality into an invalid statute.

POINT VI

The power to grant immunity is not a judicial function.

If Congress intended, as the Attorney General stated, that the District Court should participate in the grant of immunity, this conviction for contempt must be reversed. For, if the District Court was given that function to perform, it could have done so only on the basis of a record, and the Court below expressly refused to make such a

record because in its view, it was neither granting immunity nor approving its grant by the Attorney General. (R. 43).

More fundamental is the fact that the power to grant immunity cannot be a judicial function. It is an executive or legislative function, and under the Constitution of the United States, legislative and executive functions may not be delegated to the federal courts. That power has never before been given to a federal court; every other statute including those before this Court has given that power to the administrative agencies which are not subject to the limitations of Article III of the Constitution. In short, judicial exercise of the immunity power violates the separation of powers doctrine which remains an important protection of our fundamental liberties. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

We shall not argue this point at length, since it must be conceded that if our view of the statute is correct, this conviction must be reversed in any event.

A grant of immunity may be viewed either as a pardon or as an amnesty for crimes committed. The power to grant pardons rests exclusively in the President of the United States and cannot be delegated (Constitution, Article II, Section 2; *Ex parte Garland*, 4 Wall. 333 (1886). This was the view of the Senate Judiciary Committee in 1876 when it opposed authorizing Congress to give immunity to witnesses in its investigations (Sen. Rep. 253, 44 Cong. 1st Sess.). If a grant of immunity be viewed as an amnesty, it is probably the exercise of legislative power. This seems to have been the reasoning of the Court in *Brown* v. *Walker*, 161 U. S. 591, and it is certainly the core of the decision of Chief Judge Cardozo in *Matter of Doyle* v. *Hofstader*, 257 N. Y. 244 (1931).

The determination of whether immunity ought to be granted involves the consideration of many important

policy questions. Attorney General Brownell recognized these, when, on March 18, 1954, he said:

> "The Attorney General is the officer most likely to know the facts; he is the one person who knows the plans for pending prosecutions; he is the person best able to assess the value of the testimony to be obtained against the loss of power to prosecute." (Brownell, *Address before the Sixth Annual Conference on Civil Liberties of the National Civil Liberties Clearing House.*)

As the American Bar Association Commission on Organized Crime pointed out:

> "* * * Some responsible authority must make the determination of whether, as a matter of policy, it is desirable to immunize this witness and forgive him his crimes, in return for testimony which will help to convict others." (Report, 1953, p. 37.)

It has been described as "a delicate policy judgment" and "an act which is 'political' in the highest sense of the term" (*Dixon, supra*, pp. 511, 513). The various elements which go into the determination of whether immunity should be granted are summarized by John M. Kernochan, Director of the Legislative Drafting Research Fund, Columbia University, who said:

> "1. Immunity legislation inevitably poses this problem: by whom should the actual granting of immunity be controlled? In many of the provisions examined for the present study, the evidence is strong that this problem was given inadequate attention. Yet the selection of the agency to decide whether or not evidence should be compelled and immunity conferred in a particular case is one of the most critical issues raised by immunity statutes. It should receive painstaking consideration in any drafting or revision. The determination which, as a practical matter, must be made by the selected agency in any specific instance is a complex one. Some of the elements of that determination can be roughly indicated by a question:
>
> "Q. Is the evidence expectable from W (this witness) so important to this proceeding, and

> is this proceeding so important, that W should now be compelled to give his evidence and so be immunized, in spite of the offense for which he may go unpunished and in spite of the damage his immunity may do to present or future efforts to enforce the criminal laws of this state or to the wider public interest in a just, orderly society?
>
> "If this formulation is reasonably accurate, it strongly suggests that the agency best qualified to make the determination will be one thoroughly and currently conversant with both the general and the detailed situations regarding enforcement of the criminal laws. To make a wise decision, that agency should be informed with respect to the particular witness involved, his offense, and his importance to the proceeding. It should be equipped to weigh this proceeding against others pending or planned, not merely locally but on a wider basis. These considerations seem to point clearly to the enforcement authorities as the proper agency to exercise the principal control over grants of immunity. Such a solution conforms to the essential nature of immunity legislation as an instrument in aid of law enforcement. * * *" (Amer. Bar Ass'n, *Immunized Crime and Law Enforcement*, pp. 168-9.)

This is not the stuff of judicial decision.* We merely call the attention of the Court to such classic decisions as *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226 (1908); *Hayburn's Case*, 2 Dall. 409 (1792); and *Gordon v. U. S.*, 117 U. S. 697 (1864); *Matter of Richardson*, 247 N. Y. 401 (1928).

As Mr. Justice Jackson said in discussing Article III in relation to the immunity power:

> "It also precludes imposition on federal constitutional courts of nonjudicial duties. Recent trends to empower judges to grant or deny wiretapping rights to a prosecutor or to approve a waiver of prosecution in order to force a witness to give self-incriminating

* This is the conclusion, too, of the most thorough study made of this subject. Dixon, *supra*.

testimony raise interesting and dubious questions. A federal court can perform but one function—that of deciding litigations—and can proceed in no manner except by the judicial process." (Jackson, *The Supreme Court in the American System of Government*, p. 12.)

The fact is that Congress here was seeking the unattainable. It recognized that the power to grant immunity, lodged exclusively either in a committee of Congress or in a political officer of the United States Government, might, particularly in these times, result in serious abuses. So it decided to grant the power to confer immunity on that branch of the government which is least likely to be affected by political considerations, *i.e.*, the judiciary.

Unfortunately for the desire of Congress, our Constitution does not permit such a delegation. This is not the first time in our history that Congress has sought unsuccessfully to assign to the courts a non-judicial function which it felt it could not safely delegate to the executive branch. *Muskrat* v. *United States*, 219 U. S. 346 (1911).

We are, of course, aware of the many federal immunity statutes on the books today in which witnesses upon testifying before administrative agencies receive immunity from prosecution for crime. None of these laws, however, supports the validity of the statute in issue here since in none of them was a federal court given the duty of determining whether immunity should be given.

In *Brown* v. *Walker*, *supra*, an immunity law applicable to a witness before a grand jury was held valid. But the immunity vested in him immediately upon his testifying in accordance with the legislative mandate. No judge played any part in the grant of immunity. The Court's function there, unlike here, was the standard one of directing the witness to answer a question put to him by a grand jury.

In the present case it is the District Court's duty to decide whether, as a matter of public policy, immunity should be given the witness. The distinction between that and the situation in *Brown* v. *Walker*, *supra*, is the heart of the problem before this Court.

There is another constitutional defect in the statute. We treat it briefly because it is almost self-explanatory and, in addition, may not be reached by this court. We refer to the fact that the principal sections of the statute, those relating to congressional committees, involve no "case and controversy" in the constitutional sense. See *United States* v. *Ferreira*, 13 How. 40 (1851); Dixon, *supra*, Taylor, *Grand Inquest*, 296-300 (1955). In enforcing these sections, the Court therefore exercises no judicial function.

We do not believe that Congress intended the grand jury section, here under consideration, to survive if the congressional committee sections are struck down. This Court "must give heed to" the Congressional intent. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419. Those sections were the "vital aim" of the statute, *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165 (1932). S. 16 as it originally passed the Senate was limited to that subject; in several years no grand jury bill even emerged from its Judiciary Committee. The House bill, which treated both of grand juries and committees was described by Representative Walter as intended primarily for use of the House Committee on Un-American Activities (100 Cong. Rec. 13325). Finally it is well to recall the rivalry between the Attorney General and Congress over control of the immunity power. It is plain that the various sections of the law were "conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole," *Allen* v. *Louisiana*, 103 U. S. 80 (1880); *i.e.*, one was "an inducing cause" of the other. 2 Sutherland, *Statutory Construction*, 100-181 (2d Ed. 1943). See *Woods* v. *Shore-*

line Coop. Apt's., 84 F. Supp. 660, 666 (N. D. Ill. 1949) *rev'd on other gr'ds*, 338 U. S. 897 (1949).

This explains the absence of a separability clause which today is almost as common as a statute's title. Sutherland, *supra*, 179, ftnote 7. The clause is a significant indication of Congress' intention. *Dorchy* v. *Kansas*, 264 U. S. 286 (1924). The "omission of such a provision evidences clearly the legislative intent that this statute must stand or fall as a whole." *Family Security Life Ins. Co.* v. *Daniel*, 79 F. Supp. 62, 65-66 (E. D. S. C., 1948, *rev'd on other gr'ds*, 336 U. S. 220 (1949). Finally, "(T)he penal nature of a statute may be a makeweight on the side of inseparability." Sutherland, *supra*, 196-197; 6 R. C. L. 132; *State* v. *Cudahy Packing Co.*, 33 Mont. 179, 82 P. 833 (1905).

We conclude that the legislative history of these bills, Congress' insistence upon some immunity power, the inability of a grand jury bill alone to pass either House, the absence of a separability clause and the penal character of the statute make an invincible case for inseparability. Since the Congressional appeal to the courts is unconstitutional under the "case and controversy" principle, the grand jury sections, assuming their validity, would be unenforceable because of Congress' intention to pass a single cohesive statute.

POINT VII

If the statute is constitutional, the Government failed to show why the District Court should exercise its discretion by granting immunity. Petitioner affirmatively showed why the Government's application should be denied.

We have shown that important policy decisions are involved in the grant of immunity. We have argued that this is not a judicial function. Should this Court nevertheless hold that the exercise of the immunity power is

a judicial function, it must reverse the judgment of conviction because of the total absence of evidence supporting the Government's application. For under our system of law, a judgment must be based upon a court's independent determination based upon the record before it.

This general rule is particularly applicable here because of the nature of the immunity grant, its necessarily restricted use and the legislative history of the statute involved. It was not the legislative intention that immunity be granted on a wholesale basis. That has never been the conception of the immunity power. As Chief Judge Cardozo has said:

> "* * * a power to suspend the criminal law by the tender of immunity is not an implied or inherent incident of a power to investigate. It may be necessary for fruitful results in a particular instance, but is not so generally indispensable as to attach itself automatically to the mere power to inquire." *Matter of Doyle* v. *Hofstader*, *supra*, at 260-261.

Mr. Justice Frankfurter, dissenting in *United States* v. *Monia*, 317 U. S. 424, 434 (1943), said:

> "Indeed, so sensitive has Congress been against immunizing crime that it has not entrusted prosecutors generally with the power to relieve witnesses from prosecution in exchange for incriminating evidence against others."

The Chairman of the Securities and Exchange Commission has shown how these general considerations are actually applied in administrative agencies:

> "Generally speaking, the power to grant immunity is one which is very rarely exercised and even when it is the grant of immunity is extended only to minor participants in a scheme after it has been demonstrated that their testimony is an absolute prerequisite to the successful completion of an investigation." *Letter of Donald C. Cook, to Sen. Harley Kilgore*, 99 Cong. Rec. 8343 (1953).

If immunity was not to be granted upon a wholesale basis, what are the factors which must be presented to the Court before it is to act in the particular case? We have set them forth above at Point VI and they need not be repeated here.

These requirements were not met by the Government. It failed to present facts either in its written of oral application upon which a court might act judicially. Thus the District Court was never told what reasons in the Government's view justified the prayer for relief. No evidence was offered by the Government. The court below did not examine the grand jury minutes. It was merely handed the United States Attorney's "judgment" and the Attorney General's "approval", predicated upon undisclosed facts—assuming that any existed.

A court of the United States is not an auxiliary of the Department of Justice. Its decisions are not determined by the judgments of prosecuting officials. It cannot intelligently act upon an application when not a single relevant factor is presented in support thereof. Therefore, the Government failed to sustain its burden.

Petitioner, on the other hand, submitted an affidavit showing why the immunity power should not be exercised by the Court. He showed that the investigation was a political *cause celèbre* in which the Administration had staked much to persuade the American people that petitioner and other New Deal figures were guilty of espionage.

Petitioner, like many other former government officials, has been subjected to repeated harassment for eight years by the grand juries and congressional investigating committees, with a fanfare of injurious publicity accompanying even allegedly secret grand jury proceedings. The respondent has undercut the very foundation of the grand jury system by publicly charging the grand jury witnesses with membership in an espionage ring (R. 16, 19-21).

Petitioner is faced with the denouement of these eight years of harassment if he cannot preserve his right of silence. The Administration's stake in this adventure is now so high that it must emerge at least with a perjury indictment. It should not be forgotten that this original accuser, Elizabeth Bentley, was the principal witness in the Remington case, *supra*, was shown therein to have written an espionage exposé in which the grand jury foreman had a financial interest, and that she recently was made a staff consultant to the House Committee on Un-American Activities (N. Y. Times, Aug. 19, 1955, p. 1). There has been and can be no indictment for substantive crime because it has never been justified by the facts despite the public accusations by the highest law officer of the Government. But if petitioner repeats the denials which he made in 1947 before the F.B.I. and in 1948 before a congressional committee, he is a natural victim.

POINT VIII

The order below should be reversed because it directed petitioner to answer questions in violation of his First Amendment rights and not relevant to a bona fide investigation into espionage.

The grand jury hearing purported to be an investigation into the crime of espionage. But many of the questions relate to a different subject, that of the alleged Communist party membership of various persons.

A. The First Amendment

We address ourselves here to one basic point: an inquiry into political membership and associations violates the First Amendment to the Constitution. It would be a work of supererogation for us now to review the historical and legal materials on this subject. We merely call the Court's attention to two such statements, Coke's in

Edwards' Case, 13 Co. Rep. 9, 77 Eng. Rep. 1421, and Mr. Justice Jackson's in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943).

Of course, this Court has not read the First Amendment as we believe history intended it. But it is one thing for a court to decline to interfere with the power of a coordinate branch of the Government, such as the legislature; it is another for it to take the principal responsibility for an infringement of fundamental liberty.

The District Court was in error in its reliance upon the majority opinions in such cases as *Josephson* v. *United States*, 165 F. 2d 82 (C. A. 2, 1947), involving the right of the House Committee on Un-American Activities to investigate into the area of political propaganda (R. 43-44). Surely it will not be argued by the Government that a grand jury has an equal right to examine into propaganda in contrast to crime. In any event, the question remains whether this Court will give its sanction to such an investigation when it is not faced with a question of relations with a coordinate branch of the Government.*

In determining whether testimony should be compelled, as in the present case, this Court should give the most liberal construction possible to the First Amendment for the protection of the liberties it encompasses. This is one case in which the Court's discretion is unhampered in determining that the federal courts will not invade the basic freedoms of association and belief.

Accordingly, the questions relating to political belief and affiliation were improper and the refusal to answer them could not be the basis for a contempt adjudication.

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* The reference of the District Court to *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2, 1954) is inapposite. Since that case did not involve espionage; it hardly supports an inquiry into political affiliations in the course of an alleged espionage investigation such as the present one.

B. Irrelevance and Entrapment

The danger of perjury prosecutions and entrapment are illustrated by the scope of the questions for which approval was secured by the Government.

This grand jury investigation purported to be an inquiry into espionage during the years 1941-5, which were the subject of the Bentley accusations. Yet, as we have seen, many of the questions put to petitioner relate not to espionage, but to the alleged membership of persons in the Communist Party.

Whatever may be one's views on the subjects of Communists and Communism, there is no doubt but that these are matters quite different from that of espionage. We know of only one person who has consistently and deliberately confused these subjects, namely, Senator Joseph McCarthy, in his Fort Monmouth and other hearings (S. Reps. 230, 231, 84th Cong., 1st Sess. (1955)).

The purpose of this inquiry into political membership is quite plain. An indictment for espionage is obviously not justified, else it would have been instituted long ago. However, inquiries concerning Communist party membership, affiliations and sympathies have proven susceptible of manipulation into perjury prosecutions. See *U. S. v. Neff*, 212 Fed. 2d 297 (C. A. 3, 1954); *Gold v United States*, *supra*; *United States v. Remington*, *supra*; *Bridges v. United States*, *supra*; *United States v. Lattimore*, *supra*.

Inquiries into this subject are not bona-fide investigations of crime, because it is not a crime to be a member of the Communist party. But these inquiries are sources of entrapment because of the vagueness of the concept of membership in a political party which the courts and others have had difficulty in defining. *United States v. Remington*, *supra*. See also *Hearings* on Institute of Pacific Relations before Subcommittee on Internal Security, 82nd Cong., 1st and 2nd sess., pp. 3523, 3526, where Dr. Owen

Lattimore and the Internal Security Subcommittee had considerable difficulty in reaching a definition of that term.

The new Communist Control Act of 1954, 68 Stat. 775, 50 U. S. C. 784, sets forth fourteen criteria of Communist party membership which accentuate the seriousness of the problem. As if this were not enough the statute goes on to provide:

> "The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated."

We have seen in one case that the views of a witness on the subject of trade with China were considered relevant to a jury's determination as to whether he was a member of the Communist party. *Bridges* v. *U. S.*, supra. The Government's ready use of such elastic terms as "a sympathizer or any other kind of promoter of Communism or Communist interests" is notorious. *United States* v. *Lattimore*, *supra*. That particular prosecution will long be a landmark warning of the dangers of testimony on political subjects and the motives of those who would compel it.

POINT IX

The immunity order was invalid because it did not contain any grant of immunity. Nor did it define the scope of petitioner's immunity against future prosecution, penalties and forfeitures.

The Government's original application to Judge Weinfeld was accompanied by an order which failed to contain a grant of immunity or even to describe the immunity intended to be given to the witness. The District Court originally stated that:

"* * * in the event * * * that I conclude to grant this application, I am not quite satisfied with the form of the order. I think the order should contain a very clear and unequivocal grant of the immunity so that there can't be any question about it and it has got to be as broad as the statute. And in this form of order that you have submitted to me I find no reference at all to the grant of immunity. I think that should be part of the order and actually be a separate decretal provision" (S. M. 80-81).

The Government opposed the inclusion in the order of any grant of immunity or even a reference to the kind of immunity to which the witness was entitled as a result of his testimony. As if this were not enough, it deliberately emphasized the uncertainties of the situation and hence the hazards to the witness by stating:

"* * * To be sure this Court, in connection with respondent's attack on the constitutionality of the statute, had occasion to reach certain conclusions regarding the extent of immunity granted by the act. But the matter of the extent of the immunity which will accrue to respondent by his testimony is after all not directly at issue now. That question will only arise should an attempt later be made to prosecute the respondent. This may never occur and the wiser policy is to await the event. It is enough for present purposes that the order clearly state that the respondent is instructed to testify subject to the immunity statute" (Government's Memorandum in Opposition to Counter-Order, p. 6).*

The Court, however, signed an order which contained neither a grant of immunity nor any reference to its scope (R. 44).

Thus the so-called immunity statute which began with uncertainty has ended as intended by the Government in even greater uncertainty. The District Court's earlier intention to include an immunity grant in the order was the only

* This memorandum was presented to the Court below and will be filed with this Court.

one which could give protection to the witness, assuming that the problems of statutory construction and constitutional law could be resolved. Further, it was the only logical one based upon a statute granting coordinate power to a court.

But even if we had been in error with respect to the Court's role, it is inconceivable that the order directing the witness to testify should deliberately leave undefined the nature of the protection intended to be given the witness.

It is perfectly clear why the District Court changed its position following the conclusion of the hearing. It believed that an inclusion in the order of a *description* of the immunity might be construed as a *grant* of the immunity and hence an acceptance of the basic position of petitioner, namely, that the District Court shared in the immunity grant. Whatever the explanation for this surprising omission, the resulting order promises such vague benefits, creates such hazards and leaves the witness so helpless and ignorant of his fate that it cannot stand as a valid direction to surrender the historic privilege guaranteed him by the Fifth Amendment.

CONCLUSION

The judgment of conviction and the immunity order should be reversed and the proceedings below dismissed.

Respectfully submitted,

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APPENDIX

Public Law 600—83d Congress

CHAPTER 769—2D SESSION

"§ 3486. Compelled testimony tending to incriminate witnesses; immunity

"(a) In the course of any investigation relating to any interference with or endangering of, or any plans or attempts to interfere with or endanger the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of its Government by force or violence, no witness shall be excused from testifying or from producing books, papers, or other evidence before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, when the record shows that—

"(1) in the case of proceedings before one of the Houses of Congress, that a majority of the members present of that House; or

"(2) in the case of proceedings before a committee, that two-thirds of the members of the full committee shall by affirmative vote have authorized such witness to be granted immunity under this section with respect to the transactions, matters, or things concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence by direction of the presiding officer and

that an order of the United States district court for the district wherein the inquiry is being carried on has been entered into the record requiring said person to testify or produce evidence. Such an order may be issued by a

United States district court judge upon application by a duly authorized representative of the Congress or of the committee concerned. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecutions described in subsection (d) hereof) against him in any court.

"(b) Neither House nor any committee thereof nor any joint committee of the two Houses of Congress shall grant immunity to any witness without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court for the district wherein such inquiry is being held. The Attorney General of the United States shall be notified of the time of each proposed application to the United States district court and shall be given the opportunity to be heard with respect thereto prior to the entrance into the record of the order of the district court.

"(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987), violations of the Atomic Energy Act of 1946 (60 Stat. 755), as amended, violations of sections 212 (a) (27), (28), (29) or 241 (a) (6), (7) or 313 (a) of the Immigration and Nationality Act (66 Stat. 182-186; 204-206; 240-241), and conspiracies involving any of the foregoing, is

necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture, nor or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

"(d) No witness shall be exempt under the provision of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."